85-963

No. _____

Supreme Court, U.S.
FILED
DEC 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RAYMOND B. HOLMAN,
Staff Sergeant, United States Army,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BROOKS B. LA GRUA
Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
USALSA-DAD
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

BERNARD P. INGOLD
Captain, JAGC
U.S. Army

DAVID W. SORENSEN
Captain, JAGC
U.S. Army

33 pp

QUESTION PRESENTED

WHETHER the United States Court of Military Appeals was correct in determining that the military have *per se* subject matter jurisdiction for every offense committed overseas by United States soldiers, even if there was no "service connection" and the offense was triable in a United States Court.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Statement	1
Statutory Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
I. THIS COURT HAS HISTORICALLY LIMITED THE EXERCISE OF COURT-MARTIAL JURISDICTION TO THE MINIMUM REQUIRED TO ACCOMPLISH THE MILITARY MISSION. THERE IS NO NEED FOR A *PER SE* OVERSEAS EXCEPTION TO THE *O'CALLAHAN v. PARKER* RULE REQUIRING "SERVICE CONNECTION"	5
II. THE FUNDAMENTAL RIGHTS GUARANTEED BY *O'CALLAHAN v. PARKER* AND *RELFORD v. COMMANDANT* ARE ABROGATED BY THE ADOPTION OF A *PER SE* OVERSEAS EXCEPTION TO THE "SERVICE CONNECTION" REQUIREMENT	7
III. THIS PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION ON THE UNCONSTITUTIONAL EXTENSION OF CRIMINAL JURISDICTION BY THE MILITARY COURTS WHICH ACTS TO DEPRIVE UNITED STATES CITIZENS OF FUNDAMENTAL RIGHTS	9
IV. PETITIONER IS PREJUDICED BY THE DECISION OF THE COURT BELOW	10
Conclusion	11

TABLE OF CONTENTS—Continued

	Page
Appendix A	1a
Appendix B	2a
Appendix C	10a
Appendix D	12a
Appendix E	13a
Appendix F	14a

TABLE OF AUTHORITIES

Cases:	Page
Bloom v. Illinois, 391 U.S. 194 (1968)	6
O'Callahan v. Parker, 395 U.S. 258 (1969)	5, 6, 7, 8, 9
Homcy v. Resor, 455 F.2d 1345 (D.C. Cir. 1971)	6
Reid v. Covert, 354 U.S. 1 (1957)	5
Relford v. Commandant, 401 U.S. 355 (1971)	5, 7, 8, 9, 10
United States v. Black, 1 M.J. 340 (CMA 1976)	7, 8
United States v. Cotton, 471 F.2d 744 (9th Cir. 1973)	8
United States v. Cruz, 20 M.J. 873 (ACMR 1985)	6
United States v. DuBay, 17 USCMA 147, 37 CMR 411 (1967)	6
United States v. Hawthorne, 7 USCMA 293, 22 CMR 83 (1956)	6
United States v. Holman, —— M.J. —— (CMA 1985)	1, 8
United States v. *Holman*, 19 M.J. 784 (ACMR 1984)	1, 7, 8
United States v. Johnson, 14 USCMA 548, 34 CMR 328 (1964)	6
United States v. Keaton, 19 USCMA 64, 41 CMR 64 (1969)	7
United States v. Lazzaro, 2 M.J. 76 (CMA 1976)	8
United States v. Newvine, 23 USCMA 208, 48 CMR 188 (1974)	7
United States ex rel Toth v. Quarles, 350 U.S. 11 (1955)	6, 8, 9
United States v. Rosser, 6 M.J. 267 (CMA 1979)	6

TABLE OF AUTHORITIES—Continued

	Page
United States v. Weinstein, 19 USCMA 29, 41 CMR 29 (1969)	7
United States v. Yslava, 18 M.J. 670 (ACMR 1984), *pet. granted*, 19 M.J. 281 (CMA 1985)	6
Constitution and Statutes:	
U.S. Constitution	
Article I, Section 8, Clause 14	2
Article III, Section 2	2
Amendment V	2
Amendment VI	2
Uniform Code of Military Justice, 10 U.S.C. § 801-940 (1982)	
Article 2	2
Article 3	2
Article 17	2
Article 18	2
Article 121	4
Manual for Courts-Martial, United States, 1969 (Revised edition)	
Paragraph 14	3
10 U.S.C. § 921	4
18 U.S.C. § 641	3, 8
28 U.S.C. § 1259	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. ———

RAYMOND B. HOLMAN,
Staff Sergeant, United States Army,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Raymond B. Holman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at —— M.J. —— (CMA 1985) (Appendix A). The opinion of the Army Court of Military Review appears at 19 M.J. 784 (ACMR 1984) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on October 8, 1985, affirming petitioner's con-

viction dated May 13, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Article I, Section 8, Clause 14:

> The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.

Article III, Section 2:

> . . .
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . .

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . .

The Uniform Code of Military Justice provides:

Article 2, 10 U.S.C. § 802 (1982) (Appendix C).

Article 3, 10 U.S.C. § 803 (1982) (Appendix D).

Article 17, 10 U.S.C. § 817 (1982) (Appendix E).

Article 18, 10 U.S.C. § 818 (1982) (Appendix F)

The *Manual for Courts-Martial, United States, 1969 (Revised edition)* provides:

Paragraph 14.—

Jurisdiction of General Courts-Martial.

a. Persons and offenses.

Subject to the regulations prescribed in 13, general courts-martial have power to try any person subject to the code for any offense made punishable by the code. In addition they have power to try any person who by the law of war is subject to trial by military tribunal for any crime or offense against the law of war and for any crime or offense against the law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or in part by the military authority of the occupying power. The law of occupied territory includes the local criminal law as adopted or modified by competent authority, and the proclamations, ordinances, regulations, or orders promulgated by competent authority of the occupying power (Art. 18).

A general court-martial composed only of a military judge does not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case (Art. 18).

The United States Code provides:

Title 18—Crimes and Criminal Procedure.

Chapter 31—Embezzlement and theft.

Section 641. Public money, property or records.

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for

the United States or any department or agency thereof; or

Whoever receives, conceals or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

STATEMENT OF THE CASE

On January 12, 25, and 28, 1983, in the Republic of Korea, the appellant transferred a substance he represented to be methamphetamine to a special agent of the Criminal Investigation Command. All three transactions occurred off the military installation. Subsequent field tests conducted on the substances proved negative for the presence of methamphetamine (Record of trial at 261-266, 281, 291, 292-295).

The petitioner was tried by a general court-martial on April 18 and 25, and May 9, 10, and 13, 1983. Contrary to his pleas, he was convicted of three specifications of larceny by false pretense in violation of Article 121, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 921 (1982). He was sentenced to a bad-conduct discharge, confinement at hard labor for six months, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The Army Court of Military Review affirmed the findings and sentence on December 27, 1984 (Appendix B).

The question presented in this petition has been fully litigated at every stage of the appellate process. The

issue granted by the Court of Military Appeals, as a prerequisite to this Court's jurisdiction, was as follows:

> WHETHER THE MILITARY LACKED JURISDICTION TO COURT-MARTIAL THE APPELLANT EVEN THOUGH THE OFFENSE OCCURRED OVERSEAS, SINCE THE OFFENSE WAS TRIABLE IN A UNITED STATES CIVIL FORUM AND THERE WAS NO SHOWING OF THE NECESSARY SERVICE CONNECTION.

REASONS FOR GRANTING THE WRIT

In rejecting petitioner's assertion of a lack of subject matter jurisdiction, the Court of Military Appeals sanctioned a broad exception to *O'Callahan v. Parker*, 395 U.S. 258 (1969) for all offenses committed by soldiers overseas. This unlimited "overseas exception" is wholly inconsistent with previous decisions of this Court and fails to afford soldiers the constitutional guarantees mandated by *O'Callahan v. Parker*, *supra*, and *Relford v. Commandant*, 401 U.S. 355 (1971).

I. THIS COURT HAS HISTORICALLY LIMITED THE EXERCISE OF COURT-MARTIAL JURISDICTION TO THE MINIMUM REQUIRED TO ACCOMPLISH THE MILITARY MISSION. THERE IS NO NEED FOR A *PER SE* OVERSEAS EXCEPTION TO THE *O'CALLAHAN v. PARKER* RULE REQUIRING "SERVICE CONNECTION."

This Court has noted that every extension of jurisdiction within the military acts to deprive American citizens of the fundamental rights and protections guaranteed by the Bill of Rights and Article III of the Constitution. Further, it is an encroachment upon the jurisdiction of the civilian courts. *O'Callahan v. Parker*, *supra*; *Reid v. Covert*, 354 U.S. 1 (1957).

"[A]ny expansion of court-martial jurisdiction like that in the 1950 Act necessarily encroaches on the juris-

diction of federal courts set up under Article 3 of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals." *Toth v. Quarles*, 350 U.S. 11, 15 (1955). These fundamental rights include a trial free from possible coercion or influence by the executive or legislative branches of the Government, presentment or indictment by a grand jury, and a right to a trial by jury. *Toth v. Quarles*, 350 U.S. at 16.[1] As this Court so aptly stated, "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles*, 350 U.S. at 17.

Where the fundamental rights of citizens are encroached upon, the narrowest and least drastic means possible must be employed. *Bloom v. Illinois*, 391 U.S. 194 (1968). Consequently, the constitutional power of Congress to authorize trial by court-martial has been limited "to the least possible power adequate to the end proposed." *O'Callahan v. Parker, supra*, citing *Toth v. Quarles, supra*. There is no need for a *per se* exception to the "service connection" requirement when a crime is committed overseas and is triable in a civilian court within the United States.

---

[1] Over the last three decades, federal and military courts have been confronted with recurring instances of unlawful command influence, which have threatened the fundamental right of citizen soldiers to a fair trial. *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971); *United States v. Hawthorne*, 7 USCMA 293, 22 CMR 83 (1956); *United States v. Johnson*, 14 USCMA 548, 34 CMR 328 (1964); *United States v. DuBay*, 17 USCMA 147, 37 CMR 411 (1967); and *United States v. Rosser*, 6 M.J. 267 (CMA 1979). Such attempts to impermissibly influence trials call into question the integrity of the military judicial system itself. The issue of unlawful command influence of military commanders upon the integrity of the military judicial system is again being litigated in the military appellate courts. *See, e.g., United States v. Yslava*, 18 M.J. 670 (ACMR 1984), *pet. granted*, 19 M.J. 281 (CMA 1985); *United States v. Cruz*, 20 M.J. 873 (ACMR 1985).

II. THE FUNDAMENTAL RIGHTS GUARANTEED TO SERVICE MEMBERS BY *O'CALLAHAN v. PARKER* AND *RELFORD v. COMMANDANT*, ARE ABROGATED BY THE ADOPTION OF A *PER SE* OVERSEAS EXCEPTION TO THE "SERVICE CONNECTION" REQUIREMENT.

In *O'Callahan*, this Court stated that the military possesses jurisdiction only in cases in which it can establish a "service connection." In *Relford*, this Court directed that trial courts consider twelve factors in determining whether the military had jurisdiction.

The United States Court of Military Appeals has held that the "service connection" requirement of *O'Callahan* does not apply in the case when a crime occurs in a foreign country and it is not triable in a civilian court in the United States. *United States v. Newvine*, 23 USCMA 208, 48 CMR 188 (1974); *United States v. Weinstein*, 19 USCMA 29, 41 CMR 29 (1969); *United States v. Keaton*, 19 USCMA 64, 41 CMR 64 (1969). This exception has been commonly referred to as the "overseas exception." Prior to the instant case, the Court of Military Appeals applied the "overseas exception" only in those cases satisfying two criteria: the offense occurred overseas, and it was not cognizable in a civilian court within the United States. If either criterion was not met, the Court of Military Appeals resorted to the *Relford* factors to determine whether the necessary "service connection" existed to vest jurisdiction in the military. *United States v. Black*, 1 M.J. 340 (CMA 1976).

In its decision in this case the Army Court of Military Review expanded the "overseas exception" and established a *per se* rule that "the overseas situs of an offense, committed by a servicemember who is overseas pursuant to military orders, necessarily establishes the 'service-connection' of the offense and thus the court-martial jurisdiction over such misconduct." *United States v. Holman*, 19 M.J. at 786. The Army Court of

Military Review determined that it was immaterial whether a civilian court would be able to exercise jurisdiction over an overseas offense because, in its view, the actual exercise of this jurisdiction was remote. 19 M.J. at 787. The Court of Military Appeals expressly approved the analysis and decision of the Army Review Court in this case and thereby sanctioned a substantial expansion of military jurisdiction. *United States v. Holman*, —— M.J. —— (CMA 1985) (Appendix A).

The analysis and conclusion of the courts below is contrary to this Court's decisions in *O'Callahan v. Parker*, *supra*, and *Relford v. Commandant*, *supra*. These cases clearly established that if an offense is committed where there is no "service connection," and where there is a United States civilian court within which jurisdiction could vest, an accused soldier is entitled to the constitutional protections afforded by the civilian courts. This result is mandated whether or not the civilian court is likely to exercise that jurisdiction. *Cf. Toth v. Quarles*, *supra*. The Army Court of Military Review appeared to ignore the fact that petitioner's offenses were cognizable in a civilian court under 18 U.S.C. § 641 (1982), stating:

> Since those rights are not available in a foreign court, trial by court-martial comes as close as possible to ensuring those rights when the offense is not cognizable in a United States civilian court. Accordingly, military jurisdiction is found without any inquiry into service-connection. We believe a more appropriate "overseas exception" is one based upon the service-connection inherent in an offense committed by a servicemember overseas.

19 M.J. at 786. Thus, the court appeared to recognize, but failed to follow, the rule of *United States v. Black*, *supra*, where the petitioner's crimes were properly triable under 18 U.S.C. § 641 (1981) in a federal court within the United States. *United States v. Lazzaro*, 2 M.J. 76 (CMA 1976); *United States v. Cotton*, 471 F.2d 744 (9th Cir. 1973).

III. THIS PETITION PRESENTS AN IMPORTANT FEDERAL QUESTION ON THE UNCONSTITUTIONAL EXTENSION OF CRIMINAL JURISDICTION BY THE MILITARY WHICH ACTS TO DEPRIVE UNITED STATES CITIZENS OF FUNDAMENTAL RIGHTS.

The exercise of jurisdiction by the military during time of peace is limited to those crimes and situations where the military can show a "service connection." *O'Callahan v. Parker, supra.* If the offense is not triable within a civilian court, the military must still show a "service connection" before exercising jurisdiction, as Congress has the Constitutional power to provide for trials in federal courts for offenses committed by soldiers. *Toth v. Quarles, supra.* It is unreasonable to contend that discipline within the armed forces, their orderly processes, or the morale of their members, will be adversely affected by affording soldiers the same constitutional protections enjoyed by the citizens in a trial in civilian courts. *Cf. Toth v. Quarles, supra.*

Grants of jurisdiction to the military have been narrowly restricted throughout the history of this country. This Court has observed that "military trial of soldiers committing civilian offenses has been viewed with suspicion." *O'Callahan v. Parker,* 395 U.S. at 299 (footnote omitted). The erosion of the principle that crimes committed by soldiers should be tried in civil courts and not military tribunals, "were among the grievances protested by the American Colonists." 395 U.S. at 300 (footnote omitted). As noted by this Court, "history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." 395 U.S. at 298. In recognition of this historical development, this Court has acted to curtail attempts by the military to expand its jurisdiction. *See, e.g., O'Callahan v. Parker, supra,* and *Relford v. Commandant, supra.* The petitioner submits that such action is again required in the instant case.

The decision below indicates a substantial departure from the traditional concepts of court-martial jurisdiction as mandated by this Court. At the time of the ratification of the Constitution, court-martial jurisdiction was narrowly confined to military offenses. Over time, the military expanded their exercise of jurisdiction. This Court curtailed the exercise of military jurisdiction to include only those offenses where a "service connection" could be established. However, the exercise of jurisdiction must be limited to the least possible required to accomplish the end proposed and still ensure the protection of fundamental rights to those American citizens within the Armed Forces.

IV. THE PETITIONER WAS PREJUDICED BY THE RULING OF THE COURT BELOW.

It is submitted that the government would have been unable to establish a "service connection" for petitioner's offenses upon application of the *Relford* factors. Therefore, the petitioner was entitled to be tried in a civilian court wherein his fundamental rights would have been ensured and protected.

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, and the fact that the United States Court of Military Appeals has decided the instant case in a manner that conflicts with the applicable decisions of this Court, the petition for certiorari should be granted. The question presented is substantial and of crucial significance. The exercise of jurisdiction denies fundamental constitutional rights to servicemembers with far reaching effects.

Respectfully submitted,

BROOKS B. LA GRUA
Colonel, Judge Advocate
General's Corps (JAGC)
United States Army
USALSA-DAD
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

BERNARD P. INGOLD
Captain, JAGC
U.S. Army

DAVID W. SORENSEN
Captain, JAGC
U.S. Army

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51574/AR
CMR Dkt. No. 444649

UNITED STATES,
Appellee,

v.

RAYMOND B. HOLMAN (265-94-5036),
Appellant.

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, we hold that the overseas exception to court-martial jurisdiction over an accused set forth in *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed. 2d 291 (1969), and *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed. 2d 102 (1971), was properly applied to the facts of this case, as evidenced by the excellent analysis of this issue by the court below. *United States v. Holman*, 19 M.J. 784 (A.C.M.R. 1984). Accordingly, it is by the Court this 8th day of October, 1985,

ORDERED:

That the petition for grant of review is granted; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (SORENSEN)
Appellate Government Counsel (JOHNSON)

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY
RI

Before
SU-BROWN, YAWN and WALCZAK
Appellate Military Judges

CM 444649

UNITED STATES,
Appellee,

v.

STAFF SERGEANT RAYMOND B. HOLMAN,
265-94-5036, United States Army,
Appellant.

2d Infantry Division
R. Bogan, Military Judge

Captain Robert S. Johnson, JAGC, argued the cause for the appellant. With him on the brief were Lieutenant Colonel William P. Heaston, JAGC, and Captain Harry L. Williams, Jr., JAGC.

Captain Thomas E. Booth, JAGC, argued the cause for the appellee. With him on the brief were Colonel James E. Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Major Larry D. Williams, JAGC.

[27 Dec. 1984]

OPINION OF THE COURT

SU-BROWN, Senior Judge:

Contrary to his pleas appellant was convicted of three specifications of larceny by false pretenses in violation of Article 121, Uniform Code of Military Justice, 10 U.S.C. § 921 (1982). The military judge, sitting as a general court-martial, sentenced appellant to a bad-conduct discharge, confinement at hard labor for six months, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The convening authority approved the sentence.

The offenses in this case arose when appellant, on three separate dates, sold substances he represented to be illegal drugs to an undercover military police investigator at a Korean bar. Since the substances were not the promised drugs, appellant was charged with three specifications of larceny of the government funds given to him in exchange for the substances. These specifications, which vary only as to the date of the offenses and the amounts stolen, allege, in pertinent part, that appellant "did, at Tong-du-Chon, Korea, . . . steal . . . US currency, the property of the US Government, said offense occurring outside the territorial limits of the United States." At trial appellant argued that the specifications did not contain sufficient information to demonstrate court-martial jurisdiction over the offenses as required by *United States v. Alef*, 3 M.J. 414 (CMA 1972). Appellant also argued that, even though his offenses were committed overseas, the military, as a substantive matter, lacked jurisdiction to court-martial him since his

offenses were triable in a United States civilian forum under 18 U.S.C. § 641 (1982)[1] and the Government did not prove his offenses were service-connected. *See O'Callahan v. Parker*, 395 U.S. 258 (1969) (a crime must be service-connected to be under military jurisdiction). *See also Relford v. Commandant*, 401 U.S. 355 (1971). Appellant renews these arguments before this Court. We find them to be without merit.

The Supreme Court in *O'Callahan* restricted military court-martial jurisdiction to offenses that were "service connected." The decision in *O'Callahan* did not purport to limit, and has not been interpreted as limiting, military jurisdiction over offenses committed by a service-member in a foreign country. *See United States v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969); *United States v. Keaton*, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969); *Hemphill v. Mosley*, 443 F.2d 322 (10th Cir. 1971); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl. 1970). Instead, a well known exception to *O'Callahan*, known as the "overseas exception," has developed. The overseas exception was most recently discussed by the Court of Military Appeals in *United States v. Black*, 1 M.J. 340 (CMA 1976). In *Black* the Court stated this exception is triggered only if an offense is committed overseas and is not a violation of an American penal statute so as to be cognizable in a civilian court in the United States.

Under a literal application of *Black* this case does not fall within the "overseas exception" since appellant's

---

[1] *See* United States v. Lazzaro, 2 M.J. 77 (CMA 1977) (18 U.S.C. § 641 has extraterritorial effect); United States v. Cotton, 471 F.2d 744 (9th Cir. 1973). This section of the United States Code makes it a federal crime for an individual to embezzle, steal, purloin or knowingly convert to his use or the use of another, or without authority, sell, convey, or dispose of any record, voucher, money or thing of value of the United States or of any department or agency thereof.

offenses were punishable under a federal statute with extraterritorial effect.[2] The inapplicability of this exception does not establish the military lacked jurisdiction. Instead, the case is then analyzed under the criteria of *O'Callahan* and *Relford* to determine whether the offense is service connected.

The overseas exception, as discussed in *Black*, was not based upon the military having a *per se* interest in an offense committed overseas. The exception developed in

---

[2] In United States v. King, 6 M.J. 553 (ACMR 1978), *pet. denied*, 6 M.J. 290 (CMA 1979), this Court questioned the second element of the overseas exception as enunciated in *Black*. This Court did not believe the application of the overseas exception turned on whether the charged offense was cognizable in a United States civilian court. *King* noted that *O'Callahan* did not make the absence of an available civilian court a requirement for jurisdiction and that prior precedent had not established such a prerequisite for application of the overseas exception. One judge in *King* also questioned the precedential value of *Black* since the Court in *Black* found, as a preliminary matter, that the offense at issue had not occurred overseas and therefore did not satisfy the first element of the "overseas exception." 6 M.J. at 553 (DeFord, J., concurring).

In any case, *Black* does not establish whether the determination that an offense is cognizable in a civilian court is based on a practical or a theoretical inquiry. In *Black* the Court found the offense was cognizable in a United States court since federal statutes prohibited the charged offenses and a civilian court had personal jurisdiction over the accused. This analysis indicates a pragmatic application of the second element of the overseas exception. Subsequent opinions by the Court of Military Appeals only note cryptically that the overseas exception is inapplicable because the offense is "in violation of an American civil penal statute with extraterritorial effect so as to be triable in a United States civil forum." United States v. Lazzaro, 2 M.J. 76, 76 (CMA 1976) (per curiam). *See also* United States v. Gladue, 4 M.J. 1, 5 (CMA 1977). These decisions indicate that application of the second element of the overseas exception may not have been based on practical considerations. We do not resolve this ambiguity since our decision renders it unnecessary to parse the meaning of the overseas exception set forth in *Black*.

recognition that, if an offense occurs overseas, trial by court-martial was preferrable to trial by a foreign court. The service-connection test of *O'Callahan* was developed to ensure that the rights to indictment and trial by jury, which are guaranteed in an American civilian court, are preserved for a servicemember unless the military has a particular interest in asserting jurisdiction. Since those rights are not available in a foreign court, trial by court-martial comes as close as possible to ensuring those rights when the offense is not cognizable in a United States civilian court. Accordingly, military jurisdiction is found without any inquiry into service-connection. We believe a more appropriate "overseas exception" is one based upon the service-conneciton inherent in an offense committed by a servicemember overseas.

In *Relford v. Commandant, supra*, the Supreme Court established an "on-post" exception to *O'Callahan*. This exception, which establishes military jurisdiction over all offenses committed on-post by servicemembers, was premised on the determination that when an offense is committed on-post the service-connection of the offense is per *se* established. Similarly, we find the overseas situs of an offense, committed by a servicemember who is overseas pursuant to military orders, necessarily establishes the "service-connection" of the offense and thus the court-martial jurisditcion over such misconduct.

In *Schlesinger v. Councilman*, 420 U.S. 730 (1975), the Supreme Court stated:

> [Service-connection] turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.

Id. at 760. *See also Relford*, 401 U.S. at 367-68. Applying these considerations to an offense committed overseas

by a servicemember, we find such an offense has an obvious and unquestionably adverse impact upon military operations and the military mission.

To ensure good order and discipline, the military must be able to control and direct its servicemembers overseas. One of the more practicable methods for maintaining order in a command is the ability to try and punish misconduct. The need for this power is primary overseas. Unless the military retains control over the servicemember, he will be unavailable to perform his duties. The sensitivity of our overseas missions, coupled with the economic cost of sending an individual overseas and then replacing him if he commits a crime and is not subject to military control, compels the conclusion that the military's ability to efficiently and effectively execute its mission is compromised whenever a servicemember commits a crime overseas.

Additionally, with respect to the military's presence overseas, the relationship between the military and foreign community tends to be injured when an offense is committed. As a consequence, servicemembers may not receive local support from the community, which in turn affects morale. *See United States v. Lockwood*, 15 M.J. 1 (CMA 1983). While certain offenses may seem to have little direct effect on foreign relationships, the reputation of the military is nonetheless tarnished by such offenses. As a representative of the United States, the military has a strong interest in ensuring that the integrity and honor of its troops are not questioned. The military cannot become known as the bastion for criminals of any type. As the Court of Military Appeals recognized in *Lockwood*, maintaining intangibles like reputation and morale are essential to accomplishing the military mission. 15 M.J. at 10. While these intangibles are important wherever the military is located, the need for maintaining them are far greater in a foreign country where the military is, in effect, a guest. The military has a compelling in-

terest in ensuring that its presence is welcomed in the foreign community. This interest extends from mitigating the alienation a soldier may feel living in a foreign community to securing the continual presence of the military. Accordingly, the geographical and military relationships overseas cannot be underestimated in assessing the service-connection of overseas offenses. *See Relford*, 401 U.S. at 368.

These factors, which establish the service-connection of an overseas offense, are not counterbalanced by the probability that a United States civilian court will vindicate the military interest. As a theoretical matter, an offense committed overseas may be cognizable in a United States civilian court. As a practical matter, the possibility that a civilian court will exercise jurisdiction over such an offense is remote. *See Hemphill v. Mosely*, 443 F.2d 322 (10th Cir. 1971) (determination of which federal statutes apply overseas and where venue would lie is problematic). Moreover, if an American civilian court did exercise its jurisdiction in these cases, such prosecutions are not likely to be responsive to the military's concerns and interests in maintaining its disciplinary authority overseas.

In *United States v. Lockwood*, the Court of Military Appeals directed:

> [T]he criteria for service-connection should be reexamined periodically in light of changes in the conditions under which the Armed Services perform their assigned missions and the accompanying changes in the impact of crimes upon their ability to accomplish those missions.

15 M.J. at 10. Examining the criteria for service-connection with respect to an offense committed overseas by a servicemember who is present there pursuant to military orders, we are persuaded in all instances that such offenses are service-connected. We do not believe

courts need to engage in an *ad hoc* determination of whether court-martial jurisdiction lies over such offenses. Under the "overseas exception" based upon service-connection, military jurisdiction will automatically be found. Consequently, the overseas situs of appellant's offenses was sufficient to establish court-martial jurisdiction and satisfy the pleading requirements of *Alef*. *Cf. United States v. Adams*, 13 M.J. 728 (ACMR 1982) (if jurisdiction was in fact established, appellant has no complaint under *Alef*).

We find the remaining assignments of error to be without merit.

The findings of guilty and the sentence are affirmed.

Judge YAWN and Judge WALCZAK concur.

FOR THE COURT:

/s/ William S. Fulton, Jr.
WILLIAM S. FULTON, JR.
Clerk of Court

APPENDIX C

Article 2, 10 U.S.C. § 802 (1982).

Persons subject to this chapter

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their term of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while they are on inactive duty training authorized by written orders which are voluntarily accepted by them and which specify that they are subject to this chapter.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or, accompanying the armed forces outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth or Puerto Rico, Guam, and the Virgin Islands.

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

APPENDIX D

Article 3, 10 U.S.C. § 803 (1982).

Jurisdiction to try certain personnel

(a) Subject to section 843 of this title (Article 43), no person charged with having committed, while in a status in which he was subject to this chapter, an offense against this chapter, punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or a State, a Territory, or the District of Columbia, may be relieved from amenability to trial by court-martial by reason of the termination of that status.

(b) Each person discharged from the armed forces who is later charged with having fraudulently obtained his discharge is, subject to section 843 of this title (Article 43), subject to trial by court-martial on that charge and is after apprehension subject to this chapter while in the custody of the armed forces for that trial. Upon conviction of that charge he is subject to trial by court-martial for all offenses under this chapter committed before the fraudulent discharge.

(c) No person who has deserted from the armed forces may be relieved from amenability to the jurisdiction of this chapter by virtue of a separation from any later period of service.

APPENDIX E

Article 17, 10 U.S.C. § 817 (1982).

Jurisdiction of courts-martial in general.

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under the chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

APPENDIX F

Article 18, 10 U.S.C. § 818 (1982).

Jurisdiction of general courts-martial.

"Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 494984 21005